IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 876 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VAGHRI DHANA KESHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 876 of 1998

MR YOGESH S LAKHANI for Petitioner No. 1-2

MR BY MANKAD APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 14/08/2001

ORAL JUDGEMENT

#. The appellants-accused are real brothers. They have challenged in this appeal the judgment and order of conviction and sentence dated 24.8.1998 passed by the

learned Sessions Judge, Surendranagar in Sessions Case No.109 of 1994 whereby both the accused have been convicted for the offences u/s. 363 and 366 r.w.s. 114 IPC. The appellant-accused No.1 was also convicted for the offence under Section 376 IPC. He has been sentenced to suffer 7 years R.I. and to pay fine of Rs.2,000/= in default to further undergo 1 year R.I. Both the accused have been sentenced 1 year R.I. and fine of Rs.500/= in default to further undergo 3 months S.I. for offence under Section 363. Similarly, they have been sentenced to suffer 5 years R.I. and to pay fine of Rs.1,000/= in default to further undergo 6 months S.I. for the offences under Section 366 r.w.s. 114 IPC. The period during which they remained in jail as under-trial prisoners has been given set off. All substantive sentences are ordered to run concurrently.

#. This appeal was admitted on 23.9.1998 and the bail was refused at that time. However, it was made clear by the learned Single Judge that if the appeal is not heard within a period of 1 year from the date of that order, then it will be open to the appellants to move application for bail. It is stated at the Bar by learned counsel Shri Lakhani for the appellant that both the accused have been released on bail on 6.2.2001 only and at present they are on bail.

#. Complainant Devabhai PW-3 Ex.27 lodged FIR Ex.47 before police on 15.3.1994 at 10.15 p.m. against appellants-accused for the offences under Section 363, 366 r.w.s. 114 IPC. It is stated in the FIR that he is doing the business of selling cows. They are five brothers and five sisters. He is eldest whereas, Champaben (prosecutrix) is aged about 16 years. She got married with one Jeelu before 8 months at Ranpur. There she stated for 10 days but thereafter she was not called, therefore, she was staying with him. It is further stated in the FIR that on 24.2.1994 accused Dhana Kesha and Mepa Kesha came to his house along with sister Labhu for attending Vadmela temple fare and stayed at his home. Next day Labhu went but both the accused stayed for one more night at their house. On 27.2.1994 his sister Champa, Dhana and Mepa were at home, however, when he returned at 10.00 a.m. they were not there. On inquiry he was told by her maternal aunt Jeeluben that she has seen Dhana and Mepa taking his sister along with them. Thereafter, he inquired at Dhranghdra and village Koda, but the whereabouts were not found. When he asked mother of accused, then she stated that his sister was brought by her sons, but she does not know where they are. He was inquiring about his sister on his own. As according

to him if he gets his sister, then he was not inclined to do anything in the matter. However, both the accused have kidnapped and abducted his sister with an intention to commit ill act with her.

#. Thus, there was delay of about 17 days in lodging FIR. In pursuant of the aforesaid FIR accused No.1-Dhana Kesha was arrested on 30.3.1994 whereas, his brother Mepa-accused No.2 was arrested on 27.4.1994. During the trial they were enlarged on bail.

#. Before the learned Judge the prosecution examined (1) complainant Devabhai PW-3 Ex.27, brother of prosecutrix; (2) prosecutrix, Champaben Ex.33; (3) his mother Jeevuben at Ex.34 and other witnesses like doctor and I.O. Considering their evidence the learned Judge found that evidence is reliable, therefore, convicted them for the aforesaid offences and sentenced them accordingly.

#. Learned counsel Lakhani for the appellants-accused vehemently submitted that there was no case against appellants-accused No.2 whatsoever for the offence under Section 363 and 366 IPC. He further submitted that prosecutrix had nowhere stated in her evidence that accused No.1 had committed forcible rape on her. According to him, Champaben was not happy with her marriage which took place before 8 months with Jeelubhai, therefore, she was not going to her husband house. There was already child marriage contact between her and accused Dhana and they had close relations and in fact they were staying as husband and wife during the period from 27.2.94 till 30.3.94 when the accused No.1 was arrested, but even at their residence also they were staying as husband and wife. Mr.Lakhani submitted that there is evidence in the form of school leaving certificate regarding birth date of prosecutrix Champaben. Such evidence is not reliable in view of the oral evidence of Jeevuben, mother of prosecutrix. He submitted that prosecutrix was matured and grown up and above 18, therefore, the learned judge committed error in convicting both the accused for the offences u/s.363, 366 and 376 IPC.

#. From the evidence of prosecutrix, Champaben it is clear that she had nowhere stated in her chief examination that accused No.1 had committed forcible rape. It is true that she has stated that she was 16 at the time of incident. It is also true that there is school leaving certificate regarding her birth date and as per the said certificate she was below 16 at the time of commission of offence. But that date was

approximately given by her mother Jeevuben. Jeevuben, PW-3 has clearly stated in her evidence that on the same day she got her daughter and her son Naru admitted in the school. As per the certificate of Naru his birth date is 1.11.1974. Jeevuben has further stated that age difference of one year or so is there between Naru and Champaben. In that view of that matter Champaben must have born in the year 1975. However, when she gave her approximate birth date i.e. 1.6.1978, that means, the school leaving certificate was not authenticate in the instant case. If she was born in the year 1975, then the incident had taken place on 27.2.1994, thus, she would be obviously above 18 years old. Unfortunately, in the instant case doctor has not examined the prosecutrix and given any opinion regarding her age. Radiologist's opinion was sought for but the same is not coming forward.

#. Having carefully considered the evidence of prosecutrix Champaben PW-5, her mother Jeevuben PW-3, her brother Devabhai, I am of the opinion that their evidence is not wholly reliable. It is true that the suggestion made to complainant Deva that he was demanding Rs.10,000/= from the accused and when they refused to pay complaint was filed. Very fact that there was delay of 17 days suggest that initially the parties had no objection. In fact, it has come out in the evidence of I.O. that prosecutrix and the accused were asked to leave their house. The very fact that both the accused came to the house of the complainant on 24.2.1994 along with their sister Labhuben and stayed there for 3 days, shows that there are close relation between the parties. In fact, accused No.1 was giving money to the complainant Deva. It seems for any of the reason later on this complaint was filed. When prosecutrix herself had admitted in her cross-examination that she was staying with accused No.1 as husband and wife, then in the instant case it cannot be said that the prosecution has proved its case against accused No.1 for the offence u/s.376 IPC. Evidence regarding Section 363 and 366 IPC is also lacking. It seems that merely because accused No.2 was with his brother accused No.1, therefore, he is involved in this case. On the facts of this case it cannot be said that accused No.1 has also committed offence under Section 363 or 366 IPC. It appears that on her own prosecutrix, Champaben has left with both the accused on 27.2.1994 as she was not happy with her first marriage.

In view of the above discussion, the judgment and order of conviction passed by the learned Sessions Judge

is required to be quashed and set aside. The learned Judge has convicted both the accused on the assumption and has not considered the evidence in its proper perspective. No authority would be applicable on the facts of this case, which is relied upon by the learned Judge for convicting the accused for the aforesaid offences.

In view of the above discussion, this appeal is allowed. The impugned judgment and order of conviction dated 24.8.1998 passed by the learned Sessions Judge in Sessions Case No.109 of 1994 convicting both the appellants-accused for the offences under Section 363 and 366 IPC is hereby quashed and set aside. Similarly, the order of conviction passed by the learned Judge for the offence under Section 376 IPC against the accused No.1 is also quashed and set aside. Fine if paid shall be refunded to the accused. The appellant accused are on bail. Their bail bonds stand cancelled.

(B.J.Shethna, J.)

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